IN THE

Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

AGAINST

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541.

BRIEF IN BEHALF OF APPELLEE.

Statement of the Case.

The complainant is a citizen of the State of New York (fol. 3). The defendant, a corporation, is a citizen of the State of West Virginia (fol. 3). The writ of subpœna and bill of complaint were served in the Southern District of New York on the defendant's treasurer (fols. 2, 16). The defendant, appearing specially for that purpose (fol. 12), thereupon moved the Court to set aside the service (fol. 14) on the ground that the defendant was a corporation organized under the laws of West Virginia; that it was not engaged in business, and had no property, in the State of New York; that its treasurer, on whom process had been served, was not in that State officially or as representing any business or interest of the corporation; and

that the defendant under these circumstances had not been brought into court by any legal service (fol. 16). The motion was granted on the authority of Conley vs. Mathieson Alkali Works, 190 U. S., 406, and kindred cases. The complainant thereupon prayed an appeal to this Court. The appeal was taken, as it is claimed, under the authority of Section 5 of the Act of March 3, 1891, which provides:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

No certificate of any question of jurisdiction is contained in the record.

The case has been advanced on the appellant's motion under the 32d rule of this Court.

ARGUMENT.

I.

THE DEFENDANT HAS NO DOMICILE OR ABODE IN THE STATE OF NEW YORK; IT IS NOT ENGAGED IN BUSINESS IN THAT STATE; AND THE SERVICE OF THE SUBPŒNA ON ITS TREASURER WAS INEFFECTIVE TO BRING IT INTO COURT.

The decision of this Court in Conley vs. Mathieson Alkali Works, 190 U. S., 406, has established the rule of law that must govern the decision of this case. It was there held that the residence of an officer of a corporation does not necessarily give the corporation a domicile in the State; that he must be there officially,

representing the corporation in its business, and that service in New York of a summons upon a director of a foreign corporation, who resides in New York, is not sufficient to bring the corporation into Court, where at the time of service the corporation was not doing business in the State of New York.

The facts in that case are very similar to those in the case at bar. There, the corporation was organized under the laws of the State of Virginia. It maintained until December 31, 1900, a plant for the manufacture of soda at Niagara Falls. On that date it conveyed its plant to another corporation. Its principal office was maintained at Providence, R. I., and there it kept its books and records, its office force and its bank account. None of its products, after January 1, 1901, were sold in New York State. A by-law of the company, adopted in 1896, provided that the directors should hold monthly meetings in the City of New York, but it did not appear that meetings had been held in compliance with the by-laws. The fact was that they were held sometimes in Saltville, sometimes in Providence, and in 1901, on two or three occasions, in New York, at the office of R. T. Wilson & Co., bankers in Wall street, a member of which firm was a director of the defendant and one of its principal stockholders.

Upon these facts it was held that the defendant at the time of the service of the summons, was not engaged in business within the State of New York, and that the attempted service was ineffective to confer jurisdiction. The Court said :

> " The principle announced in Goldey v. Morning News, 156 U. S., 518, covers the case at bar. The residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. He must be there officially—there representing the corporation in its business (St. Claire v. Cox, 106 U. S., 350). In other words, a corporation must be doing business there, and, recognizing the necessity of this, the Circuit Court referred that issue to a master. The decision upon

the issue was adverse to the contention of the plaintiff, and we cannot say that it was not sustained by the evidence and the presumptions which must be conceded to the report of a master and the judgment of the lower court. The defendant was competent to convey its property to the Castner Electrolytic Alkali Company, and afterwards make the locality of its own business Providence and Saltville. Whether the transfer to the latter company was fraudulent we certainly cannot decide from this record, and the by-law which provided for a monthly meeting in New York, could not of itself keep the corporation in New York. The testimony is positive that no business of the corporation was done in New York city after the transfer of the Niagara Falls plant; that all of the business of the corporation was conducted at Providence, except that of a purely manufacturing character, which was conducted at Saltville."

To the same effect are many other cases:

Goldey vs. Morning News, 156 U. S., 518.
Fitzgerald Construction Co. vs. Fitzgerald, 137 U. S., 106.
Geer vs. Mathieson Alkali Works, 190 U. S., 429.
Caledonian Coal Co. vs. Baker, 196 U. S., 444.
Sharkey vs. Indiana, &c., Railway Co., 186 U. S., 479.
Wabash Western Ry. Co. vs. Brow, 164 U. S., 271.
In re Keasbey, 160 U. S., 221.
St. Clair vs. Cox, 106 U. S., 350.
Central Grain & Stock Exchange vs. Board of Trade, 125 Fed., 463.
Martin vs. New Trinidad Asphalt Co., 130 Fed., 394.
McGillin vs. Claflin, 52 Fed., 657.
Good Hope Co. vs. Railway Barb Fencing Co., 22 Fed., 635.

The doctrine of these decisions is applicable here. The defendant was incorporated for the purpose of developing a self-feeding loom attachment. It has been unable to place its loom upon the market, and for more

than three years it has been moribund (fol. 17). It has never manufactured merchandise; it has never made a sale; and it has never engaged in the transaction of the business for which it was organized (fol. 16). It has no assets or property in the State of New York, and it has no office or place of business in that State (fol. 16). Those of its officers who reside there, are not there officially or as representing any business or interest of the corporation (fol. 16). The mere residence of directors in a State does not give the corporation a situs in that State. If that were so, a corporation organized under the laws of New Jersey, and engaged in business there exclusively, would be suable in New York if its directors were residents of the latter State. The test is, not where the directors reside, but where the corporation does business. The evidence is uncontroverted that the corporate franchises of this defendant are not exercised within the State of New York. Since August 10, 1901, there has been no meeting either of the stockholders or of the directors (fol. 17). On that date the stockholders were informed that the company had no funds with which to pay the franchise taxes due to the State of West Virginia, and no funds have since been provided for that purpose (fol. 17). The company, as a result of these embarrassments, has transacted no business, has maintained no office, and an action has been commenced by the State of West Virginia to forfeit its corporate franchise (fol. 17). In that action, as appears by the bill of complaint (fol. 8), the defendant is in default, and judgment of forfeiture is expected to be entered at the ensuing term of the Court (fol. 8).

The sole assets of the company are two automatic looms, the tools and machinery employed in the making thereof, and its patents (fol. 17). The looms, machinery and tools are in Attleboro, Mass. They are kept in the machine shop of the Frank P. Mossberg Company at that place (fol. 17). Mr. Mossberg has made several attempts to improve the looms (fol. 17). The letters patent are also in his possession, and

in the same place (fol. 17). The company has no bank account, no office force and no employees (fol. 17). It has never reached the stage of the active transaction of business, and such assets as it possesses are beyond the territorial limits of the Court whose jurisdiction was invoked.

Plainly, under these circumstances, the service must be pronounced invalid *Prima facie*, the residence of a corporation is the State of its origin. If it can ever acquire a residence elsewhere, it can only be through an actual exercise of its corporate powers and functions in some other jurisdiction. If that exercise has ceased, the extension of its residence to a locality other than that of the State of its creation, must also cease. The termination of business, leaves it with no place of abode, except its original domicile. There and there only can it be served with process.

It is true that the certificate of incorporation provides that the "corporation shall keep its principal office or place of business at the City of New York, in the County of New York and State of New York." This requirement has not been obeyed (fol. 18). For the first year of the company's existence the meetings of directors were held at the office of the company's counsel, in the Mills Building, No. 35 Wall street (fol. 16). After that and until August 10, 1901, they were held irregularly at any place where accommodations could be secured. The place commonly selected was the Murray Hill Hotel, where one of the chief stockholders lived. Since August 10, 1901, no meetings have been held anywhere. The requirement of the certificate of incorporation that an office should be maintained in New York could not, unless it were obeyed, keep the corporation in that State. A similar question was involved in Conley vs. Mathieson Alkali Works, *supra*, and the Court met it with the statement that "the by-law which provided for the monthly meeting in New York could not of itself keep the corporation in New York." The presence of a corporation in a State other than

that of its creation is a physical fact. It must be determined, not by words, but by acts; not by what the corporation proposed to do, but by what it did. "For the purpose of suing and being sued in a Circuit Court of the United States, the members of a local corporation are conclusively presumed to be citizens of the State by whose laws it was created and in which alone the corporation has a legal existence." (*Thomas vs. Board of Trustees*, 195 U. S., 207, 210, and cases there cited). The presumption of the law places the corporation in the State of its creation. It may go into other States for the purpose of transacting its business and exercising its corporate functions. But its presence for such a purpose elsewhere than in the State of its origin must be made out, not by evidence that it intended, when organized, to do business and to exercise its functions elsewhere, but by evidence that it carried out that intent in practice.

The cases which attribute controlling force to the designation of the place of business, as contained in the certificate of incorporation, have relation only to the question of the situs of the corporation *within* the State of its origin. They have no bearing upon its situs without that State (*Western Transportation Co. vs. Scheu*, 19 N. Y., 408; *Galveston R. R. vs. Gonzales*, 151 U. S., 496). An artificial presumption fixes the domicile of the corporation in the State of its creation. When it becomes material to inquire within what part of that State the corporation resides, another artificial presumption accepts the statement of the certificate as the test. But that presumption has no place where it is sought to extend the presence of the corporation beyond the State of its creation. It is a presumption which reinforces, but never defeats, the broader presumption that the State which gave the corporation life is the State where it exists. Within that State the corporate situs may be determined by arbitrary rules. Beyond that State it must be determined by physical facts. Within the State of its creation, it exists where

the Legislature provides that it shall exist. Beyond that State it exists where it exercises its corporate franchise. If it has gone into another State, the suitor who urges such a claim is bound to prove it.

This burden, the plaintiff has failed to sustain. The corporation is not doing business here. It is not doing business anywhere. Physical tests failing to determine its situs, there remains only the artificial test, and that test pronounces the State of its creation as controlling. As the corporation can gain a situs elsewhere, only through transacting its business elsewhere, it follows that when business ceases, the situs of its origin becomes exclusive. That the business of this corporation has ceased, has been conclusively proved. The letters of Mr. Emery to the complainant prove nothing to the contrary. They show that the looms have been kept at Attleboro, Mass. (fol. 25); that the attempts to improve them have been made at that place; and the latest suggestion of any prospect of success is contained in the letter of January 20, 1903 (fol. 25), nearly two years before this suit. Since then failure has settled on the enterprise. The inability of the company to place its loom upon the market has resulted in a virtual, if not a nominal extinction of corporate life (fol. 17). The company is dead, except in name; and the shell of corporate existence that remains, is about to be destroyed through the judgment of the Courts of West Virginia, forfeiting the corporate franchise and terminating the corporate life (fol. 8).

II.

THE QUESTION IN ISSUE IS NOT A QUESTION OF THE JURISDICTION OF THE COURT BELOW WITHIN THE MEANING OF SECTION 5 OF THE ACT OF MARCH 3, 1891, AND AN APPEAL DIRECTLY FROM THE CIRCUIT COURT CANNOT BE SUSTAINED.

This Court has had occasion in very recent cases to consider the meaning of the statute which allows a direct appeal from the Circuit Court where the jurisdiction of that Court is in issue. It is now settled that the question must affect the jurisdiction of the Circuit Court as a Court of the United States, and not in respect of its general authority as a judicial tribunal. If jurisdiction is challenged, not on grounds peculiar to the power of a Federal Court as such, but on grounds applicable with equal force to any tribunal that renders judgment only after notice and a trial, then there is no question of the jurisdiction of the Circuit Court within the meaning of the statute.

In Courtney vs. Pradt, 196 U. S., 89, the question was whether an action could be maintained against a foreign executor. The Circuit Court held that it had no jurisdiction of such an action, and dismissed it. On appeal to this Court, the decision was that the jurisdiction of the Court below had been challenged, not in respect of its authority as a Federal Court, but only in respect of its general authority as a judicial tribunal, and hence that the appeal must be dismissed.

The Court, speaking by the Chief Justice, said :

> "The appeal was taken directly to this court, and cannot be maintained unless the case comes within the first of the classes named in section 5 of the judiciary act of March 3, 1891, which gives an appeal or writ of error direct, 'in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court

below for decision' (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat., 1901, p. 5491).

"It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the Circuit court *as a court of the United States, and not in respect of its general authority as a judicial tribunal* (Blythe vs. Hinckley, 173 U. S., 501; Mexican C. R. Co., vs. Eckman, 187 U. S., 429; Louisville Trust Co. vs. Knott, 191 U. S., 225; Bache vs. Hunt, 193 U. S., 523).

"And the general rule is that the certificate is an absolute prerequisite to the exercise of jurisdiction here (Maynard vs. Hecht, 251 U. S., 324). Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as the equivalent to the formal certificate (Huntington vs. Laidley, 176 U. S., 668; Arkansas vs. Schlierholz, 179 U. S., 598).

"But as said by Mr. Justice GRAY, in Huntington vs. Laidley, 'the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction'; that is, of the jurisdiction of the court as a court of the United States.

"No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. No single and definite issue as to the jurisdiction of the Circuit court as a Federal court is presented.

"The case was dismissed for want of jurisdiction over it, as a suit against a foreign executor, in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the Circuit court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the state courts; *or the sufficiency of the service of mesne process to authorize the recovery of personal judgment* (Goldey vs. Morning News, 156 U. S., Wabash vs. Western R. Co., vs. Brow, 164 U. S., 271; De Lima vs. Bidwell, 182 U. S., 1; Conley vs. Mathieson Alkali Works, 190 U. S., 406). It is true that in this case a motion to remand was made, but there was nothing

to indicate that it rested on the contention *that there was a lack of jurisdiction in the Federal courts as contradistinguished from the state courts.* It did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of section 5. * * *

"In our opinion the appeal was improvidently prosecuted directly to this court, and it must, therefore, be dismissed."

The conclusion reached in that case was supported, it will be observed, by reference to the very cases on which the decision in the case at bar was based (Goldey vs. Morning News; Wabash Ry. Co. vs. Brow; Conley vs. Mathieson Alkali Works). The refusal to assume jurisdiction on the ground that the service of process was insufficient to authorize the recovery of personal judgment, was instanced as affecting the general authority of a judicial tribunal, and not the authority of a Federal Court as such.

In Bache vs. Hunt, 193 U. S., 523, Hunt, as Receiver, filed his petition in the Circuit Court in the foreclosure suit of the Continental Trust Co. of New York vs. The Toledo, St. Louis and Kansas City R. R. Co., Jules Bache and others, asserting that he was entitled, out of certain of the first mortgage bonds foreclosed in the suit, to be reimbursed for amounts paid by him as Receiver in the extinguishment of prior claims which the bonds had been deposited to secure. Bache appeared specially and filed a plea to the jurisdiction of the Court over the subject matter because of the pendency in the Supreme Court of New York of a suit instituted prior to the filing of Hunt's petition by Bache as a judgment creditor, against the Toledo, St. Louis and Kansas City R. R. Co., and the Farmers' Loan and Trust Co., in which the last-mentioned Com-

pany had been appointed Receiver of the securities forming the subject of Hunt's petition on the same day on which the Hunt petition was filed; *and of his person because of the insufficiency of the method of service of the order.* The plea was overruled. From the decree of the Circuit Court an appeal was taken to this Court, where the appeal was dismissed.

Speaking by the Chief Justice, the Court said:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to the bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal Court (Louisville Trust Company vs. Knott, 191 U. S., 225; Blythe vs. Hinckley, 173 U. S., 501).
>
> "Tested by this rule, our jurisdiction fails, and the appeal must be dismissed."

In Louisville Trust Co. vs. Knott, 191 U. S., 225, 232, the Court said:

> "The question presented by the certificate of the Circuit Court is not one of *jurisdiction*, within the meaning of the fifth section of the act of 1891, and the jurisdiction of that court was not 'in issue.' There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a Federal court, to take cognizance of it. * * *
>
> "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in

harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

See also:

Blyth vs. Hinckley, 173 U. S., 501.
Mexican C. R. Co. vs. Eckman, 187 U. S., 429.

The rule laid down in these decisions is applicable here.

The question that the Circuit Court decided is not one as to the jurisdiction of the Federal judiciary. That the suit is cognizable in the Circuit Court of the United States for the Southern District of New York has neither been disputed by the appellee nor denied by the Court below. The complainant is a citizen of the State of New York, and a resident of the Southern District of New York; the defendant is a citizen of the State of West Virginia (Shaw vs. Quincy Mining Co., 145 U. S. 444). Indisputably, therefore, there exists that diversity of citizenship which confers jurisdiction of the cause on the Federal Courts. The trouble is that the defendant has not been served with process. An attempt has been made to bring it into court by service of the subpœna on an agent, and the sole question is whether that service was effective In passing on that question, the Court has been governed, not by any consideration peculiar to the jurisdiction of the Circuit Courts, but by considerations of general jurisprudence, applicable, as this Court has declared, to all tribunals. The very point of the decision is that a judgment recovered against a corporation through service of process on an agent in a State where it is not incorporated and not engaged in business, violates the fundamental rule that a court of justice cannot acquire jurisdiction over the person of another who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in his behalf (Goldey vs. Morning News, *supra*). This

Court, in Goldey vs. The Morning News, 156 U. S., 518, 521, referred to that rule as "an elementary principle of jurisprudence." It held that the rule bound State and Federal Courts alike; and that to permit the recovery of a judgment in violation of its requirements was to impair the constitutional guaranty to the citizen of due process of law. Whether the facts set forth in this record brought the case within the ruling in the Goldey case, and in the cases to the same effect, is a question which the Circuit Court had the right to determine and did determine as an incident to its conceded jurisdiction of the subject matter of the suit. It held that the attempted service was void. In doing this, it did not challenge its jurisdiction as a Federal Court; but it enforced the general rule of jurisprudence, applicable to it in common with all tribunals, that jurisdiction must be exercised on notice to the defendant; and that service of notice on a person who is not the defendant nor authorized to represent the defendant, must be condemned as void.

It may be urged by the appellant that in Conley vs. Mathieson Alkali Works, 190 U. S., 406, where a similar question as to the sufficiency of service was involved, an appeal was taken directly to this Court, and decided on its merits. A sufficient answer is that no question as to the jurisdiction of this Court to entertain the appeal was either considered by the Court or suggested by counsel.

As was said in Louisville Trust Co. vs. Knott, 191 U. S., 225:

> "This Court need not consider itself bound as to a question of jurisdiction because it may have exercised jurisdiction in a case where the question might have been raised, but passed *sub silentio*."

To the same effect, see:

New vs. Oklahoma, 195 U. S., 252, 256.
U. S. vs. More, 3 Cranch, 159, 172.

When the precise point that was decided in Shepard vs. Adams, 168 U. S., 618, is considered, it will be found that there is nothing in that decision inconsistent with the appellee's contention. The question there at issue affected the jurisdiction of the Federal Court *as such*. The question was whether the District Court for the District of Colorado was bound by the statutes of the State of Colorado requiring that a summons be made returnable in twenty days, or was free to make its own rules for the issuance of process. That was a question affecting its power as a Court of the United States. The validity of the process itself was questioned. Here the validity of the process is undoubted. The only question is whether the defendant has been found within the territorial limits of the Court.

The same observations are applicable to the case of Galveston Ry. Co. vs. Gonzales, 151 U. S., 497. The question there at issue affected the jurisdiction of the Federal Court *as such*. The question was whether the the suit had been brought in violation of Section 1 of the Act of August 13, 1888, which fixed the place of trial as the district of the residence of either the plaintiff or the defendant. The jurisdiction, therefore, was challenged, not on grounds affecting equally all judicial tribunals, but on grounds specially affecting the Federal Courts. There the question was: Had the plaintiff a right to litigate his grievance in that Court at all, whether the defendant was or was not served within its territorial limits? Here no question is raised as to the complainant's right to proceed in the Court which he has selected; the sole question is one of fact, has he served the defendant? In the one case, there was a question of the power of the Circuit Court as such. In the other, there is a question of its general power as a judicial tribunal.

In Mexican Cent. Ry. Co. vs. Pinkney, 149 U. S., 194, no objection, it would seem, was raised as to the right of the court to entertain the appeal. Louisville

Trust Co. vs. Knott and New vs. Oklahoma, *supra*, are, therefore, applicable. But in any event the question there was whether a state statute could give to a special appearance the effect of a general appearance so as to enlarge the jurisdiction of the Circuit Court. That was a question affecting the power of the Federal Court as such.

The fact that this Court entertained jurisdiction in Goldey vs. Morning News, *supra*, is without significance. That case was decided in the Circuit Court in 1890, before the passage of the Act of 1891. It has no bearing, therefore, on the power of this Court to entertain an appeal under existing statutes.

On the other hand, in Wabash Ry. Co. vs. Brow, 164 U. S., 271, where a like question as to the validity of service on the agent of a corporation was involved, the appeal was carried in the first instance to the Circuit Court of Appeals, and reviewed in this Court through writ of *certiorari*.

It is submitted, therefore, that no controlling decision stands opposed to the appellee's contention, and that the contention should prevail.

The Circuit Court has certified no question for review. It has not disputed its jurisdiction of the *subject matter* of the cause. It has not suggested that the *parties*, if properly brought before it, are beyond its competence, or are rendered immune from prosecution in the circuit courts. It has merely held that the defendant has not yet been served with process. That is not a question of jurisdiction within the meaning of the statute. Suppose that the question had been one of the identity of the person served, and that the Circuit Court on the ground that there had been a mistake of identity, had set aside the service. Would any one claim that its order would involve a question of jurisdiction? With as little reason, can such a claim be made in this case. The jurisdiction of the Court below as a court of the United States, both over the subject matter of the cause and over the

person of the defendant, when the defendant shall be served with process, is unchallenged. There is, therefore, no warrant for an appeal directly to this Court.

III.

THE ORDER SHOULD BE AFFIRMED, OR THE APPEAL DISMISSED.

Respectfully submitted,
BENJAMIN N. CARDOZO,
Of Counsel for Appellee.